

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–
2022) (Remand)

**MUSIC CHOICE’S OPPOSITION TO
SOUNDEXCHANGE’S MOTION FOR ISSUANCE OF A SUBPOENA**

Music Choice respectfully submits this Opposition to SoundExchange’s Motion for Expedited Issuance of Subpoena to Prager Metis CPAs, Doc No. 23886, Docket No. 16-CRB-0001 SR/PSSR (2018-2022)(Remand) (“Motion for Subpoena”).

SoundExchange’s Motion for Subpoena seeks to abuse the Judges’ subpoena power by turning on their heads the very purposes and objectives meant to be served by that power. Rather than seeking to compel testimony from an *unwilling* third party witness, SoundExchange seeks the subpoena solely to provide its own *willing* witness with an excuse to violate a nondisclosure agreement. Rather than seek evidence necessary for the Judges to have a *full and complete* record to render their determination, the Motion serves only SoundExchange’s partisan purpose of *limiting the record evidence* to a carefully crafted written declaration from its witness while at the same time seeking to withhold any relevant underlying documentary evidence on the same topic that could be used to test the truthfulness and accuracy of its witness’s declaration. The Judges should not allow SoundExchange to misuse their subpoena power in this way.

But if the Judges are inclined to issue a subpoena for the purpose of allowing SoundExchange's accountant to submit the proposed declaration on the topic of Prager Metis's 2017 investigation of the defensive audits conducted by BDO, they should at least remedy the most egregious flaw in the Motion by expanding that subpoena so it can provide a full record on the issue. To that end, Music Choice respectfully requests that the Judges modify the subpoena to also require Prager Metis to provide any documents related to its investigation and evaluation of the BDO audits, as proposed in the attached Proposed Revised Subpoena.

LEGAL STANDARD

The Copyright Act vests the Copyright Royalty Judges with the authority to issue a subpoena "commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things." 17 U.S.C. §803(b)(C)(6)(ix).

This subpoena power is to be used in extraordinary circumstances, not as a matter of course. In granting the Judges this subpoena power, Congress made clear that it "does not anticipate that the use of subpoena power will become a common occurrence" and that "[t]he CRJs are expected to exercise this power judiciously and only in those instances where they believe a subpoena is necessary to obtain information that the parties have not provided and that the judges deem necessary to make their decision." H.R. Rep. No. 108-408, at 33 (2004). *See also Copyright Royalty Judges' Authority to Subpoena a Nonparticipant to Appear and Give Testimony or to Produce and Permit Inspection of Documents or Tangible Things*, Dkt. No. RF 2009-1, 75 Fed. Reg. 13,306, 13,309 (March 11, 2010) (same). So "while the statute grants the CRJs the authority to issue subpoenas in certain circumstances, it does not compel them to issue

subpoenas in any circumstance.” 75 Fed. Reg. at 13,309. And in assessing whether the adjudication of the matter would be substantially impaired absent the proceeding, “the Judges focus will be on the purported substantial impairment of the Judges, not that of the moving party.” *Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters*, Docket No. 14-CRB-0001-WR (2016-2020), at 4 (April 3, 2014).

ARGUMENT

SoundExchange’s motion is highly irregular. The subpoena SoundExchange seeks would not serve the typical purpose of a subpoena – securing evidence from an unwilling third-party witness. Mr. Stark has served as SoundExchange’s partisan forensic accountant for many years and is, according to SoundExchange, fully willing to testify on behalf of SoundExchange. *See* Motion for Subpoena at 1. Instead, as SoundExchange’s Motion for Subpoena makes apparent, SoundExchange seeks to use this court’s subpoena power solely to manufacture an excuse for a willing witness to avoid contractual confidentiality obligations owed to a different third party – BDO. SoundExchange acknowledges that “BDO has refused to consent to use of information derived from its work papers in this proceeding.” *See* Motion for Subpoena at 5, n. 2. SoundExchange recognizes that BDO has a legal interest in the protection of its confidential work product, and that it has refused to waive that protection for this proceeding. Notably, however, there is no indication that SoundExchange has served BDO with a copy of the Motion.

SoundExchange frames its motion as an attempt to provide this court with a full and balanced record arguing that, absent the requested subpoena to Mr. Stark, the Judges could be substantially impaired in making their ruling. Motion for Subpoena at 4. But in reality, SoundExchange is doing just the opposite: seeking to withhold its own documents related to Mr.

Stark’s investigation of Music Choice’s defensive audits while asking the Judges to allow Mr. Stark only to provide one-sided testimony on the same topic in the form of an attorney-drafted declaration. SoundExchange’s motion, if granted as submitted, would frustrate the very goals meant to be served by the Judge’s subpoena power by providing only cherry-picked evidence on the topic of Prager Metis’s evaluation of the BDO audits.

Music Choice does not dispute that evidence concerning the sufficiency its defensive audits may be relevant. In fact, it propounded discovery on SoundExchange seeking documents regarding this very topic. But as noted in Music Choice’s April 29, 2021 Motion to Compel, SoundExchange refuses to produce documents in its own custody that pertain to the very issue for which it seeks this third party testimony. *See Music Choice’s Motion to Compel*, In re Determination of Royalty Rates and Terms of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), Docket No. 16-CRB-0001-SR/PSSR (2018-2022) (Remand) (April 29, 2021). In a meet and confer email just a week ago, SoundExchange acknowledged that it has documents received from Prager Metis and pertinent to the exact issue covered by the requested subpoena, but refuses to produce them, arguing that documents related to Prager Metis’s investigation of the BDO audits are privileged. *See Declaration of Margaret Wheeler-Frothingham*, ¶ 2, Ex. A. *See also Music Choice’s Motion to Compel*, No. 16-CRB-0001-SR/PSSR (2018-2022) (Remand) at 3-4. But SoundExchange has made clear that it intends to offer testimony from Mr. Stark on the very same issue – thus waiving any such claim of privilege. *See In re Sealed Case*, 676 F.2d 793, 817 (D.C. Cir. 1982), quoting *U.S. v. Nobles*, 422 U.S. 225, 239, n. 14 (1975) (The work product privilege is waived “when its holder made ‘testimonial use’ of privileged material by adducing testimony as to some of the contents of a privileged document.”); *Hager v. Bluefield Reg’l Med. Ctr., Inc.*, 170 F.R.D. 70, 78 (D.D.C.

1997), quoting 4 J. Moore, Federal Practice, 26.64[4], at 26–447 (“[W]hen the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are ‘work product.’”).

In its motion, SoundExchange argues that Mr. Stark’s testimony is necessary because “[h]aving examined BDO’s work papers, Mr. Stark is uniquely positioned to describe BDO’s procedures,” as well as to “compare BDO’s procedures to those that Prager Metis would have used in the absence of a defensive audit, and explain the significance of the differences to his work for SoundExchange.” Motion for Subpoena at 4. Even if true, the proposed subpoena sought by SoundExchange is insufficient to provide the Judges a complete and balanced record on his investigation. SoundExchange hired Mr. Stark to do that analysis of BDO’s audits back in 2017, shortly after Music Choice tendered those audits to avoid an audit by Prager Metis. Motion for Subpoena at 2. If SoundExchange were truly interested in providing the Judges with the full, balanced, and accurate facts related to Mr. Stark’s evaluation of the BDO audits it would have produced the documents it is withholding, which reflect Prager Metis’s contemporaneous analyses of those audits at the time Mr. Stark was given access to the BDO accountants and their work papers. And it would be seeking not only a pretense to submit a one-sided declaration, but also Prager Metis’s own work papers reflecting its contemporaneous analysis of the BDO audits.

But SoundExchange does not want Music Choice or the Judges to have that evidence. It wants to present the attorney-drafted declaration of its own forensic accountant and to be able to paint BDO’s work in the light it prefers for the specific purposes of this proceeding, while keeping the full evidence of Prager Metis’s actual contemporaneous evaluation of that work shielded from view. Notably, that evaluation took place over several months and concluded with Prager Metis informing Music Choice that it had received all the information it needed from

BDO and SoundExchange dropping its request to conduct its own audit for those periods without ever identifying a single error or problem with the BDO audits. *See* Declaration of Russell Potts, ¶¶ 2-6. The Judges’ subpoena power should not be so selectively invoked to serve one participant’s litigation strategy. That power may only be used to prevent the substantial impairment of the **Judges’** ability to evaluate the relevant facts, not the impairment of a participant’s ability to cherry-pick the evidentiary record. *See Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters*, Docket No. 14-CRB-0001-WR (2016-2020), at 4 (April 3, 2014) (In assessing whether the adjudication of the matter would be substantially impaired absent the proceeding, “the Judges focus will be on the purported substantial impairment of the Judges, not that of the moving party.”).

For all of the above reasons, SoundExchange’s Motion for Subpoena, as submitted, is improper and the Judges would be well within their authority to deny the motion on those grounds. If, however, the Judges are inclined in principal to issue a subpoena allowing Prager Metis to avoid the NDA it entered into with BDO, the issued subpoena must be modified to develop a full and accurate record with respect to Prager Metis’s evaluation of the BDO audits. At the very least, it must require the production of Prager Metis’s working papers and other documents reflecting its investigation, analysis, and evaluation of the BDO audits. Contemporaneous documents created by Prager Metis during and in the time period surrounding its investigation of the BDO audits will allow Music Choice and the Judges to better evaluate Mr. Stark’s proffered testimony. This is particularly important given that SoundExchange claims that Mr. Stark will now find egregious errors and problems with BDO’s audits while at the time Prager Metis actually conducted its investigation none of those supposed problems were ever

shared with Music Choice and in fact SoundExchange dropped its request to allow Prager Metis to conduct its own audit for those periods.

SoundExchange should not be permitted to seek only partial third party evidence when additional evidence is available from the same third party that would provide a more complete record on the issue. Music Choice respectfully requests, if the Judges issue a subpoena to Prager Metis, that subpoena also require the production of Prager Metis's work papers, reports, analyses, and communications generated in the course of the investigation into BDO's audits – as reflected in the attached proposed revised subpoena, attached as ***Exhibit A*** to this Opposition.

CONCLUSION

For the foregoing reasons, Music Choice respectfully requests that the Judges deny SoundExchange's Motion for Subpoena, or, in the alternative, that the Judges issue a subpoena requiring Prager Metis to produce documents in addition to Mr. Stark's testimony.

Dated: May 7, 2021

Respectfully submitted,

/s/ Paul M. Fakler

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EXHIBIT A

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
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SUBPOENA

THE COPYRIGHT ROYALTY BOARD TO:	<i>(name and address of person being subpoenaed)</i> Prager Metis CPAs 14 Penn Plaza, Suite 1800 New York, NY 10122
At the Request of: <i>(party name)</i> SoundExchange, Inc.	<i>(name, address, and telephone number of contact person)</i> Emily Chapuis Jenner & Block LLP 1099 New York Ave, NW, Suite 900 Washington, D.C. 20001 (202) 638-6000

YOU ARE COMMANDED to appear at the time, date, and place set forth below to submit testimony in this royalty rate-setting proceeding. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the matters set forth in **Schedule A**.

Place: TBD	Date and Time:
Issuing Officer Signature and Title: <i>On behalf of the Copyright Royalty Judges</i>	Date:
Issuing Officer’s Name, Address, and Telephone Number:	

YOU ARE COMMANDED to produce, at the date and time specified, for inspection and copying, the documents set forth in **Schedule B**.

Place: TBD, with copies to counsel for SoundExchange, Inc. and Music Choice	Date and Time:
Issuing Officer Signature and Title: <i>On behalf of the Copyright Royalty Judges</i>	Date:
Issuing Officer's Name, Address, and Telephone Number:	

Proof of Service		
	Date	Place
Served on (Print Name)	Manager or Service	
Served by (Print Name)	Title	
Declaration of Server		
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.		
Executed on this ____ day of _____, 2021		
		Signature of Server
		Address of Server

Schedule A

Definitions

1. “Defensive Audit” refers to an audit or any similar verification procedure initiated by Music Choice in the ordinary course of business that Music Choice contends served or should serve as an acceptable verification procedure in lieu of a verification of Music Choice’s statutory royalty payments by an auditor selected by SoundExchange pursuant to audit regulations adopted by the Copyright Royalty Judges.

Topics for Testimony

1. Prager Metis CPAs’ royalty verification procedures on behalf of SoundExchange, including the effect of Music Choice’s use of so-called Defensive Audits on Prager Metis CPAs’ ability to conduct such royalty verification procedures.
2. The Defensive Audit conducted by BDO USA, LLP (“BDO”) for Music Choice and the effect of any such audit on Prager Metis CPAs’ ability to conduct a royalty verification procedure intended to reflect the period from 2013 to 2016.
3. The scope of the royalty verification procedures Prager Metis conducts on behalf of SoundExchange, as compared to the scope of Defensive Audits conducted for Music Choice.

Schedule B

Definitions

1. “Defensive Audit” refers to an audit or any similar verification procedure initiated by Music Choice in the ordinary course of business that Music Choice contends served or should serve as an acceptable verification procedure in lieu of a verification of Music Choice’s statutory royalty payments by an auditor selected by SoundExchange pursuant to audit regulations adopted by the Copyright Royalty Judges.

Requests for Production

1. All documents, including work papers, reports, analyses, and correspondence, concerning Prager Metis CPAs’s investigation, analysis, or evaluation of the Defensive Audits conducted by BDO USA, LLP (“BDO”) for Music Choice.

Proof of Delivery

I hereby certify that on Friday, May 07, 2021, I provided a true and correct copy of the MUSIC CHOICE'S OPPOSITION TO SOUNDEXCHANGE'S MOTION FOR ISSUANCE OF A SUBPOENA to the following:

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Signed: /s/ Paul Fakler